



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 120 OF 2015

PAUL SIMIYU MKARORI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction in Criminal Case No. 1670 of 2014 in the Chief Magistrate's Court at Eldoret by C. Obulutsa Senior Principal Magistrate dated 7th September 2015]

JUDGMENT

1. PAUL SIMIYU MKARORI (*the appellant*) was convicted on a charge of robbery with violence Contrary to **Section 296(2)** of the **Penal Code** that on 14th March 2014 at **KAHOYA ESTATE** in **ELDORET WEST DISTRICT** within **UASIN GISHU** County jointly with **CAROLINE AKINYI** and others not before court, while armed with dangerous weapons, namely panga and metal bars, robbed **LEAH WATIRI** of her mobile phone make **NOKIA ASHA 200**, a **T.V** make **LG**, a **DVD** make **L.G**, a wall curtain, two jackets, two pairs of shoes and cash Ksh.3000/- all valued at Kshs.35,900/- and immediately before the time of such robbery threatened to use sexual violence on the said **LEAH WATIRI**.

2. LEAH WATIRI (PW1) was at their home in **KAHOYA** with her husband's friend watching Television her husband had left to purchase cigarettes and the door was not locked, when there was a knock at the door and about 10 people entered armed with pangas, rungus and stones. They ordered her to lie down, took her phone, then switched off the lights. They ransacked the house and took away the television set, DVD, shoes, curtains, clothes, food and ksh.3000/-. They then ordered her to get up and two of the gangsters raped her in the sitting room but she could not identify them. Meanwhile her husband's friend had been locked up in the sitting room.

3. A vehicle pulled up, and on seeing the light, the robbers left the house. Her husband returned to find them all gone. A report was made to police and she then went to hospital. She gave police details of the phone and the receipt and 2 weeks later, the phone was tracked and recovered from the appellant's co-accused.

4. CPL MWINZI (PW2) of **BAHARINI** police post confirmed receiving a report from PW1 about the robbery and on 30.03.2014, through the assistance of CID, the phone was recovered from the 2nd accused, who then led police to the appellant's home.

On 29.03.2014, a second phone was recovered from one **JANE WAMBUI**, and she took police to the 1st appellant whom she claimed had given her the phone.

5. DR JANE YATICH (PW3) who produced the P3 form with regard to PW1 stated that her clothes had mud stains and urinalysis showed the presence of spermatozoa pursuant to rape.

6. In his unsworn defence, the appellant confirmed that he knew his co-accused as a street girl, whom he met on 14.03.2014, and was to pay her Ksh.1000/- to have sex with her for the night. However he only had Ksh.200/- (which he disclosed after the event). She promised to make him suffer, so on Sunday when he went to report the loss of his identity card he was arrested. That when he realized his co accused was also in police custody.

7. The co accused **CAROLINE AKINYI** told the trial court that, she had visited the appellant's wife named **AISHA** and had been with them for 3 days when she realized her phone was missing. The appellant's wife told her the appellant had taken the phone when the appellant returned in the evening he gave her a different phone. She inserted her sim card into the phone, later she got a call from police and was informed the phone had been stolen. She then led them to the appellant who was the source of the phone, and he was arrested.

8. The trial magistrate in his judgment observed that no one identified the appellant at the scene but a phone belonging to PW1 was traced and linked to the appellant. The trial magistrate noted that although the tracking records were not produced the 2nd accused confirmed that the phone was recovered from her and she explained that the appellant was the source of the phone and PW1 positively identified it as the

one that had been stolen from her on the night in question.

9. The trial magistrate ruled out the possibility of the 2nd accused being part of the gang which attacked PW1, saying PW1 on her evidence did not allude to any woman being part of the gang which attacked her that night.

10. The trial magistrate was satisfied with the explanation given by the 2nd accused as to how she came to have the phone.

The appellant's claim that the co-accused was a short-changed twilight girl who framed him up out of revenge was rejected in the light of the explanation that she had visited the appellant's wife, and was able to lead police to the appellant's hue – thus deflating his claim that he had only met her for the night.

The trial magistrate pointed out that, it was open to the appellant to call his wife, to dispute his co-accused's claims but he had not – the trial magistrate's view was that he 2nd accused ought to have been a prosecution witness.

Further, that although the evidence was circumstantial;

“It has been shown that the said phone was traced back to him. He has not explained how he came to be on possession of the phone which he gave her. The only conclusion is that he was among the people that attacked Leah, otherwise how else could he have gotten the phone.”

11. Drawing from the decision **TEPER V R 1952 A.C.480** the trial magistrate was mindful that before drawing an inference of guilt it was necessary to ensure that there were no other co-existing circumstances that would weaken or destroy the inference. To this the trial magistrate pointed out that the appellant did not address himself substantially to the evidence against him nor did he offer any explanation as to how he came by the phone, so there was no co-existing circumstances or explanation that would weaken the inference of guilt.

The trial magistrate thus held that the appellant participated in theft of the items, and was in a group of about 10 people who were armed with an assortment of crude weapons and they threatened violence against her.

12. In meting out sentence, the trial magistrate observed that apart from taking her property, the victim was also raped, so, pronounced a death sentence on the appellant.

13. The appellant contests the findings on condensed amended grounds that;

(i) the complainant was not able to identify anyone during the incident,

(ii) the recovered phone was not positively identified by the complainant both at the police station and in court,

(iii) the circumstantial evidence was not watertight,

(iv) the death sentence metered was unconstitutional.

14. The appellant canvassed his appeal through written submissions arguing that despite claims that he was involved in the robbery, when his co-accused led police to his house, nothing related to the robbery was recovered. Further, just apart from there being no transacting record from the mobile phone service provider, there was no transcript data showing the phone was tracked by an officer from the criminal Investigating Unit. That in any event no officer from that named unit testified to confirm how they tracked and recovered the phone.

15. He poked holes at the version presented by his co-accused and accepted by the trial court, saying his co-accused did not even explain how the phone left her so as to end up with the appellant, nor how (if indeed her phone was missing then she ended up with her sim-card. It is on account of this that the appellant contends that the circumstantial evidence did not directly or indirectly link him to the offence, and to the exclusion of any other reasonable hypothesis.

He wondered how without much of fuss, his co-accused simply accepted that he had taken away her phone and replaced it with another if it wasn't that she is the one who actually knew the origins of the phone which was recovered from her.

16. The appellant doubted that the robbery even took place saying not even the complainant's children, the husband's friend or the husband were called to testify as to what took place on that night.

17. The appellant also urged this court to find that based on the recent Superior court decision in **FRANCIS KARIOKO MURUATETU & ANOR' V R (Pet No 15 of 2017)** the death sentence meted out was unconstitutional.

18. In opposing the appeal, **Ms Oduor** on behalf of the State submitted that the court properly invoked the doctrine of recent possession as the attack took place on 14.03.2014 and a phone recovered was linked to the appellant who could not give a rational explanation as to how he got to have it.

19. Further that the appellant's claim that his co-accused was a twilight girl whom he had just met one night was displaced by evidence which showed that when she led police to the appellant's house, her clothes were found there.

Counsel urged this court to be guided by the case of **ERIC OTIENO ARUM Criminal Appeal No.85 of 2005** which discussed the doctrine of recent possession, pointing out want for it to apply then;

- a) Property must be found with the suspect
- b) The property must be positively identified by the complainant
- c) The property must have been recently stolen from the complainant.

20. How was PW1 able to identify the phone as hers? She did not describe its features, or point out at any special mark she may have inscribed on it. No receipt relating to the phone was produced to confirm it belonged to her.

21. CPL MWINZI (PW2) is not the one who recovered the phone – indeed his evidence was basically a report of the 2nd accused claim, but beyond that it did not establish that indeed PW1 was the owner of the phone.

22. Then of course there is the curious situation that someone can realize her phone is missing, yet later in the evening she is given another phone (not the one she owned) and she somehow just had the sim card and inserted it – there is a gap and I think the 2nd accused was economical with the truth. Did the appellant take the phone and leave her the sim card or did she buy a new sim card? Indeed whereas the 2nd accused claimed that accused brought her the now disputed phone, PW2 said the 2nd accused ... **“...she changed her phone with you ...”**

23. I do not think the ingredients on the doctrine of recent possession were satisfied and the whole scenario left more questions than answers – even as regards the identity of the phone and its ownership.

24. Consequently I hold that the evidence was not sufficient to sustain conviction and the conviction was unsafe and is quashed.

25. The sentence be and is hereby set aside, and the appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at ELDORET this 20th day of September 2018.

H. A. OMONDI

JUDGE